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No. 99 - 286

In the
Supreme Court of the United States

FOREST PROPERTIES, INC.
(now known as RCK Properties, Inc.),
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICI CURIÆ* ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May government deny a Clean Water Act § 404 permit thereby taking a parcel of real property and avoiding the payment of just compensation by claiming that the parcel is not the relevant parcel but rather part of a larger parcel when in fact it was a separate parcel acquired at a different time and by a different method, is under different ownership, is located in a different political jurisdiction and is subject to an entirely different permit process?

2. May a property purchaser be denied just compensation because of notice of a preexisting governmental permit scheme, especially one that does not indicate the property owner has any reason to believe its permit application would not be granted or that, if not, just compensation would not be paid?

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BRIEF OF *AMICI CURIÆ* ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIÆ*

Atlantic Legal Foundation ("ALF") is a not-for-profit public interest legal foundation whose mandate includes the advocacy in the courts of principles of private enterprise and the mechanism of the market economy, protection of private property rights against unnecessary governmental intrusion, limited and responsible government, opposition to unnecessary interference by government with individual rights, and vindication of constitutional rights and protections. ALF receives financial support from individuals, business enterprises, and philanthropic foundations. ALF's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, business executives, retired public

officials and judges, and prominent scientists.

In pursuit of its mandate, ALF has frequently appeared before this Court and inferior federal courts, as well as state courts in many jurisdictions, both as counsel for a party in interest, as counsel for *amici curiæ*, and itself as *amicus curiæ* in cases involving First, Fifth, and Fourteenth Amendment rights; arbitrary and capricious exercise of power by local, state and federal officials; violations of the principle of separation of powers between the legislative and executive branches of state and federal government; and appropriate standards for admissibility of expert evidence. Of particular relevance to this case, ALF (then named "Mid-Atlantic Legal Foundation") submitted an *amicus curiæ* brief in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), in support of the petitioner in that case.

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977. Its membership consists of individuals, businesses, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. *See, e.g., UNUM Life Ins. Co. v. Ward*, 119 S. Ct. 1380 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *BMW v. Gore*, 517 U.S. 559 (1996); *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58 (2d Cir. 1997); *Cigna Health Plan of Louisiana v. Louisiana*, 82 F.3d 642 (5th Cir. 1996); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996); *Conservation Law Foundation v. Department of the Air Force*, 79 F.3d 1250 (1st Cir. 1996);

Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995); *Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co.,* 40 F.3d 492 (1st Cir. 1994); *B.F. Goodrich Co. v. Murtha,* 958 F.2d 1192 (2d Cir. 1992); *International Paper Co. v. Town of Jay,* 665 A.2d 998 (Me. 1995); *O'Brien v. New England Telephone & Telegraph Co.,* 422 Mass. 686, 664 N.E.2d 743 (1996).

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth Amendment to the United States Constitution. If the decision below is not reversed, government agencies will be able to take private property with absolutely no compensation in money or development rights, simply because it is adjacent to other property under similar ownership. Moreover, under the "coming to the regulation" theory espoused by the Court of Appeals for the Federal Circuit below, property owners unable to develop their own property when a confiscatory regulation is passed will be forced to bring litigation before the area is ready for development or to sell at a steep discount. These issues are of significance to *Amici* as well as to property owners generally. *Amici* believe that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari.*[1]

Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Forest Properties, Inc., now known as RCK Properties, Inc.

SUMMARY OF ARGUMENT

Amici argue that the issue of partial regulatory takings needs to be addressed by this Court because of the lack of consistency among the various state and federal courts that have addressed this issue and the need to recognize partial regulatory takings as significant infringements on property rights (pp. 4–13). *Amici* further contend that a purchaser of property should not be penalized by prohibiting him or her from challenging a regulation that pre-dated the purchase, because such a theory distorts the incentives for the property's development (pp. 13–19).

ARGUMENT

I. THIS CASE INVOLVES AN IMPORTANT QUESTION OF UNSETTLED FEDERAL CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

This Court should grant the petition for *certiorari* to clarify, and if need be rectify, an issue that has bedeviled the courts as a result of the takings jurisprudence of this Court in the last two decades. That issue arises from the disparate treatment accorded by this Court to partial physical takings and to partial regulatory takings in the context of a regulation that effectively prohibits all economically viable use of a distinct part of petitioner's property holdings.

It is clear from the Constitution itself that any interference with property rights which constitutes a taking must, under the

Fifth and/or Fourteenth Amendments, be compensated.[2] Prior to Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), however, this Court had applied the Takings Clause only to "physical invasion" of property.[3] In *Mahon*, this Court held, for the first time, that excessive regulation could constitute a "taking" requiring compensation. However, this Court has held that losses resulting from "mere" regulation are not compensable unless the regulations deprive the property owner of "all economically beneficial or productive use of land," *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987), presumably because government regulation is considered part of the cost of social order which all citizens must bear.[4] The way this Court's takings jurisprudence has developed creates anomalous results that are not, we submit, supported by reason or Constitutional principle.

Consider the following examples: There are two contiguous

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2. The Fifth Amendment states: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V.

3. A "physical invasion" need not be a transfer of ownership, or even an intrusion by the government itself. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a regulation that directly and unconditionally imposes a permanent physical occupation on an unwilling owner is a taking *per se*).

4. *See* JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 233 (1990). We submit that this formulation begs the question: Why should the landowner bear the cost of government regulation that, presumably, benefits all, or at least a broad class of persons?

properties, Whiteacre, which consists of five acres, and Blackacre, which comprises 50 acres. The two parcels are owned by different persons, who are not related to one another in any way. In the first hypothetical, the state floods all of Whiteacre and 10 of the 50 acres of Blackacre by building a dam and reservoir; there is little doubt that under takings law, the state would have to pay the owners of Whiteacre and Blackacre for five acres and 10 acres, respectively, and, assuming each acre is of equal value, the owner of Blackacre would receive twice as much compensation as the owner of Whiteacre. In the second case, the state requires the owners of Blackacre and Whiteacre to permit a utility company to lay fibre optic cable across their land, preventing them from digging foundations for buildings on all five acres of Whiteacre and ten of Blackacre's 50 acres. The owners of both properties would probably be entitled to compensation. As the Court reiterated in *Lucas*, regulations that result in permanent physical invasions require compensation, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas, supra,* 505 U.S. at 1015; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A permanent physical invasion is called a "categorical" taking.

In a third example, the state enacts the Greenacres Protection Law, which denies the landowner of all economically beneficial use of land which is deemed "protected" under this law. One of the areas "protected" encompasses all of Whiteacre and 10 of Blackacre's 50 acres. Under current takings jurisprudence of this Court, the Greenacres statute unquestionably has effected a compensable taking of Whiteacre, because the law has deprived Whiteacre's owner of "all

economically beneficial or productive use of [its] land"[5] and therefore the state's action is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas supra*, 505 U.S. at 1015. Under this Court's jurisprudence, and that of the Federal Circuit, it is not at all clear whether the owner of Blackacre is entitled to compensation; under the Federal Circuit's ruling in this case it would not be, whereas under the Federal Circuit's decision in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the owner of Blackacre would be entitled to compensation for the 10 acres on which it could not build.

If Blackacre is considered as a single unit, and if we assume that each of the 50 acres is of equal value, the loss of one-fifth of the value of the property would not be considered a taking by most jurisdictions, even though it is undeniable that Blackacre's owner has fewer rights and a thing of less value after the enactment of the Greenacres law than before. If one considers only the acreage affected by the Greenacres law, distinct from the unaffected acres, takings law would compel the payment of just compensation for the five acres, since 100 percent of the five acres has been rendered economically useless.

Under current decisional law, the key issue in making the determination whether there has been a compensable taking is defining the appropriate unit of property against which to conduct the takings inquiry. In determining whether a regulation "denies all economically beneficial or productive use of land," one must make a comparison, in the form of a fraction, by dividing the value of the property after the regulatory

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5. We assume that the land has no substantial residual value for other, albeit less profitable, purposes, such as use as farmland or a nature reserve.

imposition (the numerator) by the value of the property before the regulatory imposition (the denominator). While this fractional analysis is easy to visualize, it provides little or no guidance in making the often crucial determination of what unit of property will furnish the denominator value in the deprivation fraction.[6] In the third hypothetical, if the Blackacre denominator is the value of the entire 50 acre parcel, there is no taking, yet if it is the value of the ten affected acres, there is a taking.[7]

This Court has recognized the existence and importance of

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6. Justice Brandeis, in his dissent in *Mahon*, pointed out this "denominator" problem with the diminution in value test. *Mahon, supra,* 260 U.S. at 419 (Brandeis, J., dissenting, argued that the denominator in that case should be "the value not of the coal alone, but . . . the value of the whole property," both above and below ground).

7. This is the result under the Federal Circuit's current jurisprudence. To date, the "total denial of economically beneficial use" test articulated in *Lucas* is the only partial takings test adopted by this Court. *Lucas, supra,* 505 U.S. at 1015–17. It is important to note, however, that analytically there are at least two approaches to a partial takings analysis. The first, and the one that this Court has thus far recognized, requires that all economically beneficial use of the land be denied to the owner; in other words, the property must be rendered valueless by the regulation. *Lucas, supra,* 505 U.S. at 1015. The second approach permits compensation when less than one hundred percent of the value of the land is destroyed. The Federal Circuit Court of Appeals found that a taking had occurred when the value of land was reduced by approximately sixty percent. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). Under the *Florida Rock* partial takings analysis, the appropriate parcel (the denominator) for the diminution in value fraction often will be unimportant, because a partial taking will often be found even using the whole extent of the owner's contiguous holdings as the denominator. *Florida Rock, supra,* 18 F.3d at 1572-1573.

the "denominator" issue, but has yet to provide any real guidance in this area. *See Lucas, supra,* 505 U.S. at 1016 n.7.[8] While the lower courts have been faced with several

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8. In note 7, Justice Scalia acutely observed that:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. *Compare Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922) (law restricting subsurface extraction of coal held to effect a taking), *with Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497-502, 107 S. Ct. 1232, 1248-1251, 94 L. Ed. 2d 472 (1987) (nearly identical law held not to effect a taking); *see also id.,* at 515-520, 107 S. Ct., at 1257-1260 (Rehnquist, C.J., dissenting); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. CAL. L. REV. 561, 566-569 (1984).

Lucas, supra, 505 U.S. at 1016 n.7.

We submit that the "deprivation of all economically feasible use" rule should be abandoned as a separate category of regulatory takings, and that all takings, whether "physical invasions" or regulatory impositions, be compensated so that society will understand that there are costs to it if it expects to enjoy the benefits of superimposing the collective will on that of the property owner. Common good should be paid for out of the common purse, not out of the purses of individual property owners.

"denominator problem cases," they have been inconsistent in their *ad hoc* determinations not only on the facts, but in fundamental approach. Even within the Court of Appeals for the Federal Circuit, there is inconsistency. *Compare Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (stating that compensation was required where the denial of the fill permit destroyed all the value of one discrete portion of a large parcel—an 11.5-acre wetland that was part of a 250-acre building development) *and Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (finding that a compensable taking had occurred where the denial of a fill permit effectively prohibited limestone mining on the land, thereby reducing the value of the land by approximately sixty percent), *with Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (where the court refused to engage in horizontal severance[9] and thus found no taking in the denial of two of three

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9. "Horizontal severance" refers to division of land into separate parcels or areas; it is also referred to as horizontal segmentation. The term "horizontal" is used in contrast to "vertical," "temporal," and "functional" divisions of the various interests in land. *See, e.g.*, John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings*, 61 U. CHI. L. REV. 1535 (1994). Dividing a parcel into air rights, surface rights, and subsurface rights is an example of a vertical division. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (refusing to permit vertical severance of property). Dividing property interests into life estates and future estates is an example of a temporal division, and dividing a property so as to include easements, rights of way, and servitudes is an example of a functional division. Fee, *supra*, at 1537 and n.10. This Court has recognized both the functional severance of property rights, *see Nollan, supra*, 483 U.S. 825 (1987) (holding that granting a building permit to landowners on the condition that they in return give a public access easement across their property constitutes a taking); and temporal severance of property rights, *see First English Evangelical Lutheran*

fill permit requests because other "wetland necks" were considered part of the denominator). One of the principal flaws with the "denominator" analysis is that the denominator can be manipulated by the government agency or the court to achieve a particular fraction and thus reach a "no takings" conclusion, even if the result is inconsistent with prior decisions or decisions of other tribunals, or economically unrealistic. *See, e.g., Andrus v. Allard*, 444 U.S. 51 (1979), in which the Court's assignment of "value" to the few remaining sticks in the owner's bundle of rights left the owner with purely illusory power to possess, use, or dispose of the property.[10] For a description of the subtlety of land use planners in devising methods to prevent development without incurring the obligation to pay compensation, *see* Robert S. Freilich and Elizabeth A. Gavrin, *Takings After* Lucas, in David L. Callies, ed., *AFTER* LUCAS: *LAND USE REGULATION AND THE TAKING OP PROPERTY WITHOUT COMPENSATION* (American Bar Ass'n Section of Urban, State and Local Government Law 1993).

We believe that the Federal Circuit used the correct approach in *Loveladies,* and that this Court should formally adopt that analytical model. The Federal Circuit noted that it was not deciding "whether the Government can lawfully prevent a property owner from filling or otherwise injuring or

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Church v. County of Los Angeles, 482 U.S. 304 (1987) (requiring that compensation be paid for the "temporary" taking of property that occurs between the time the regulation goes in effect and the time it is struck down by a court). The broader term "conceptual severance" has been applied to all of the different types of severance collectively. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings,* 88 COLUM. L. REV. 1667, 1676 (1988).

10. *See United States v. General Motors*, 323 U.S. 373, 377-378 (1945).

destroying vital wetlands," for the existence of substantial governmental interests in environmental conservation and preservation are undeniable, but, rather, it was deciding whether, "when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that benefit fall solely upon the affected property owner, or is it to be shared by the community at large." In resolving this question of "fundamental public policy," the court noted that it had to "balance the legitimate claims of the society to constrain individual actions that threaten the larger community with . . . the rights of the individual and our commitment to private property as a bulwark for the protection of those rights." *Loveladies*, 28 F.3d at 1174-75. The *Loveladies* court's emphasis was on the fundamental importance to liberty and democracy of the balance between individual rights, including property rights, and collective interest of society.[11]

The Federal Circuit noted that the three criteria used in making the regulatory takings determination were whether: (1) there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) the property owner had distinct investment-backed expectations; and (3) in the balance

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11. Even this formulation is imperfect, because it assumes that a bureaucratic agency truly represents the interests of the community, a fact not lightly to be assumed given the complex, subtle and sometimes opaque interactions of the legislative branch, elected members of the executive branch, and the "permanent government."

    For the central importance of private property to the creation and preservation of democracy in the inevitable tension between the individual and government, *see* JOHN LOCKE, *OF CIVIL GOVERNMENT* ¶¶ 135, 138 (1690); Max Weber, *Politics as a Vocation*, in H. H. Gerth and C. Wright Mills, eds., *FROM MAX WEBER, ESSAYS IN SOCIOLOGY* 78 (Galaxy ed. 1958).

between the property owner's right to own and use the property without unwarranted governmental interference on the one hand, and on the other, the public interest asserted by the Government in support of the regulatory imposition, the liberty interest of the property owner should prevail. *Loveladies*, 28 F.3d. at 1177-78.

Historically the Takings Clause was designed to protect private citizens from governmental interference with property rights. That original purpose of the clause has, we submit, been lost or seriously diminished in the interests of expanding the regulatory state.

We urge that this Court redress the balance, and at least permit the property owner initially to shape the denominator inquiry, within the bounds of realism.

This Court should grant *certiorari* in this case and explicitly recognize the appropriateness of horizontal severance in certain cases, including this one. If, for example, the property in issue is divided under state or local law into separate lots for tax, zoning, or other purposes, it is reasonable for the court to permit the owner to treat each lot separately in the calculation of economic impact of the regulation or law that has limited the owner's rights in the property.

II. By Treating Forest Properties More Harshly than Its Related Predecessor in Title in Regard to Its Property Development Rights, The Court of Appeals Failed to Take into Account Adverse Public Policy Implications.

The Court of Appeals found that Forest Properties' investment-backed expectations were not reasonable because the Army Corps' Clean Water Act regulations were in effect when Forest Properties purchased the option to acquire the lake-

bottom property. *Forest Properties, Inc. v. United States,* 177 F.3d 1360, 1366–67 (Fed. Cir. 1999), *petition for cert. filed,* 68 U.S.L.W. 3137 (U.S. Aug. 17, 1999) (No. 99-286).

This "coming to the regulation" theory—that a purchaser on notice of a regulation cannot contest the validity of the regulation—has been disparaged by this Court in *Nollan, supra,* 483 U.S. at 833 n.2, which indicated that property owners' rights should not be altered "because they acquired the land well after the [regulatory] commission had begun to implement its policy." *Id.* In *City of Monterey v. Del Monte Dunes, Ltd.,* 119 S. Ct. 1624 (1999), this Court recently upheld a verdict in a regulatory takings case in favor of a developer who purchased the property in question towards the end of the regulatory application process without comment on the issue of "coming to the regulation."

Certainly, it is circular to insist that a purchaser loses all right to challenge a regulation simply because he or she is aware at the time of purchase that the regulation *may* be found valid. Nevertheless, as this Court has not issued a direct condemnation of the theory, several courts, as cited by Forest Properties in its Brief, Petititoner's Brief at 23, have adopted the "coming to the regulation" theory, contrary to the clear implications of this Court's holdings in *Nollan, supra,* and *Lucas, supra.*

The Massachusetts Supreme Judicial Court, on the other hand, rejected the "coming to the regulation" theory for zoning challenges in *Lopes v. City of Peabody,* 417 Mass. 299, 629 N.E.2d 1312 (1994), thus creating a conflict on an important Fifth Amendment Takings issue between the Court of Appeals for the Federal Circuit and at least one state court of last resort. *See* SUP. CT. R. 10 (a). *Lopes* was decided in light of *Lucas, supra,* on remand from this Court. *Lopes v. City of Peabody,*

507 U.S. 981 (1993); *Lopes, supra,* 417 Mass. at 300 n.2. The Massachusetts court held:

> [T]he validity of the ordinance is before us, and [the property owner], a purchaser of land subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction. We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provision first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

Lopes, supra, 417 Mass. at 302–03 (citations omitted).[12]

The absurdity of denying relief to a purchaser that "comes to the regulation" is demonstrated in this case, where Forest

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12. The confusion and consequent need for clarification in this area is clear in light of the Massachusetts Supreme Judicial Court's reservation of the applicability of the "coming to the regulation" theory to takings claims. *See Lopes, supra,* 417 Mass. at 302–03 n.7; *Steinbergh v. City of Cambridge,* 413 Mass. 736, 742–43, 604 N.E.2d 1269 (1992), *cert. denied,* 508 U.S. 909 (1993). Oral argument on the temporary takings issue in the *Lopes* case is scheduled for September 13, 1999. *Lopes v. City of Peabody,* No. SJC-08030 (Mass.), 28 MASS. LAW. WKLY. 2959 (1999).

Properties purchased the option to develop the lake-bottom property from a related company, Big Bear Properties, Inc. *Forest Properties, supra,* 177 F.3d at 1362. If "coming to the regulation" were a reason to deny Forest Properties the right to develop the lake-bottom property, then the common owners of both companies could have structured the deal in such a way that Big Bear Properties retained ownership of the option through the development stage. The transfer from Big Bear Properties to Forest Properties was a convenience for the ultimate investors who preferred shifting ownership of the option and the adjacent upland from their real estate holding company to their real estate development company because they were ready to develop the land. *See id.*

A developer with a skillful attorney could eviscerate the effect of the "coming to the regulation" theory for land in corporate ownership through legal fictions including mergers, consolidations, stock transfers, formation of subsidiaries, and corporate divisions. All that would have been required in this case would have been for Big Bear Properties to have formed a new real estate holding company and transferred all its assets aside from the subdivision in question to the new company. Instead of using Forest Properties as their real estate development company, the investors would use Big Bear Properties as their development company for this one subdivision and the new company as their future holding company. The investors in a real estate company that only owned one proposed subdivision could similarly evade the "coming to the regulation" theory by transferring their stock to a new purchaser, rather than transferring the real estate. The "coming to the regulation" theory would thus invite litigation over the form of the transaction, the nature of the transfers, and the effect of partial transfers (for instance a new investor buying out the partner of a continuing investor). The theory would also

disadvantage individual property owners and developers, who would not be able to take advantage of such sophisticated transactions to protect their development rights in their property.

In addition to its potential for spawning legal fictions and litigation, the "coming to the regulation" theory loses its superficial substantive appeal when its underlying premises are examined in light of economic principles. The theory is contrary to sound public policy because it would produce unwarranted distortions in property ownership and development patterns.

For example, a property owner's claim that a regulation constitutes a taking is not ripe until the property owner is denied the right to develop. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186, 195 (1985). Thus, the owners of undeveloped property under a "coming to the regulation" regime are in a Catch-22 when a regulation restricting development is passed. The property owners cannot challenge the regulation until they are ready to develop the property and are denied a development permit, even if the regulation would clearly constitute a taking. An owner without adequate capital to develop immediately after the regulation is adopted is in a difficult position. The owner may not want or be able to face the time, expense, uncertainty, and exasperation of challenging the regulation. In such case, the value of the property to the owner is effectively reduced to zero. Nevertheless, he cannot sell at a modest discount to someone else willing to take on the challenge, because the purchaser would not retain the same right to challenge the regulation. Instead, the owner must sell to someone else at a steep discount to cover the purchaser's loss of rights under the "coming to the regulation" theory or retain the property until such time as he or she is finally able to raise the capital to develop the property

alone. This disincentive to sell at a fair price under the "coming to the regulation" theory is thus in the nature of a long-disfavored restraint on alienation of property. *See Bowen v. Campbell,* 344 Mass. 24, 26, 181 N.E.2d 342 (1962). *See also Iglehart v. Iglehart,* 204 U.S. 478, 484 (1907).

On the other hand, an owner with adequate capital at the time the regulation is passed may have an incentive to seek to develop the property immediately, so as to receive the benefits of the regulatory challenge (the recognition of his or her development rights) when he or she is capable of exercising those rights and before future uncertainties take their toll on the owner's ability to develop the property. An owner might prefer to hold property thinking that in the long run the surrounding area will grow and development of the property will be warranted. At that time, assuming the area has grown, ordinarily the owner could then develop the property or sell the property to a developer who would retain whatever development rights the original owner had. If the "coming to the regulation" theory were applied, however, the property might well be developed prematurely because it is the only way for the owner to realize the benefits of a developed property (*i.e.,* higher value per square foot), as a subsequent purchaser (without the right to challenge the regulation) would not have the same development rights as the original owner. Since the surrounding area will not by then have grown out to the development, the price for the developed property will be lower than it would be in the future and may thus not be the best investment for the owner, nor the best use of the property at the time. This incentive for premature development would thus unnecessarily contribute to the suburban "sprawl" of leapfrogged development that has been decried recently. *See, e.g.,* Gregg Easterbrook, *Suburban Myth,* NEW REPUBLIC, Mar. 15, 1999, at 18.

Under this Court's decision in *Lucas, supra,* a complete regulatory denial of any economically beneficial or productive use of property, such as the loss of the use of the lake-bottom land at issue here, should constitute a categorical taking regardless of whether the property remains in the hands of the same owner who held the property when the regulation was passed. The "coming to the regulation" theory would promote legal fictions, encourage litigation, constitute a restraint on alienation, and stimulate premature development leading to unnecessary "sprawl." The policies behind the Fifth Amendment's protection of property ownership would be vitiated if original owners are prohibited from challenging regulations until they are ready to develop while subsequent owners are prevented from challenging the regulation when the property is ready to be developed. The issue presented addresses an important aspect of property rights which this Court should resolve to bring fairness to property development decisions nationwide.

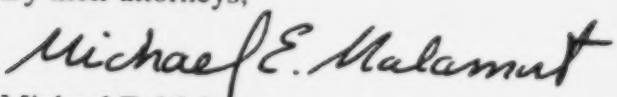
CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

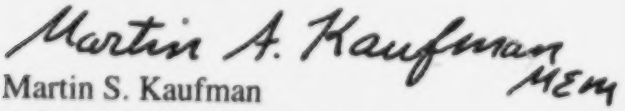
Respectfully submitted,

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